

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICO MASSA,

:

Petitioner,

:

09 Civ. 2534 (JSR) (HBP)
00 Cr. 1118 (JSR)

-against-

:

MEMORANDUM OPINION
AND ORDER

UNITED STATES OF AMERICA,

:

Respondent.

:

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PITMAN, United States Magistrate Judge:

Petitioner, an inmate in the custody of the United States Bureau of Prisons, commenced this proceeding seeking a writ of Error Audita Querela pursuant to the All Writs Act, 28 U.S.C. § 1651, modifying a judgment of conviction imposed on March 25, 2003, after a guilty plea, by the United States District Court for the Southern District of New York (Mukasey, D.J.), for (1) one count of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, (2) one count of participating in a conspiracy to commit murder in aid of racketeering activity and (3) one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 1962(d), 1959(a)(5) and 924(c), respectively. By that judgment, and pursuant to a plea agreement with the government, Massa was sentenced to a twenty-year term of

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imprisonment on count one, a ten-year term of imprisonment on count two and a five-year term of imprisonment on count three, all terms to run consecutively to each other, for a total of thirty-five years. Massa is currently incarcerated pursuant to that judgment.

Bu an undocketed motion¹ dated April 26, 2009, Massa seeks to have counsel appointed for him pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. For the reasons set forth below, the motion is denied.

Petitioner's current application for relief from the judgment of conviction is closely analogous to a petition for a writ of habeas corpus, and it is well settled that there is no constitutional right to counsel in a habeas corpus proceeding; rather the appointment of counsel in such a proceeding is a matter of discretion. Wright v. West, 505 U.S. 277, 293 (1992); Pennsylvania v. Finley, 481 U.S. 551, 555-59 (1987); Heath v. United States Parole Comm'n, 788 F.2d 85, 88 (2d Cir. 1986); Moolenaar v. Mantella, 00 Civ. 6380 (RMB) (KNF), 2001 WL 43602 at *1 (S.D.N.Y. Jan. 18, 2001). Accordingly, petitioner's application should be analyzed in the same manner as any other application for pro bono counsel in a civil case.

¹The motion will be docketed simultaneously with this Opinion and Order.

The factors to be considered in ruling on a motion for pro bono counsel are well settled and include "the merits of plaintiff's case, the plaintiff's ability to pay for private counsel, [the plaintiff's] efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel." Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989). Of these, "[t]he factor which command[s] the most attention [is] the merits." Id. Accord Odom v. Sielaff, 90 Civ. 7659 (DAB), 1996 WL 208203 (S.D.N.Y. April 26, 1996); see Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2003).


In a Report and Recommendation dated February 24, 2011, I recommended that Massa's application for relief from the judgment of conviction be denied because the case on which he relied, United States v. Whitley, 529 F.3d 150 (2d Cir. 2008), had been overruled by the Supreme Court in Abbott v. United States, 131 S.Ct. 18 (2010) and that Massa's application, therefore, not only lacked merit, it lacked any valid legal basis.

Because Massa's application for relief from the judgment of conviction lacks any legal basis, no purpose would be

served by appointing counsel to represent him and his application for the appointment of counsel is, therefore, denied.

Dated: New York, New York
March 17, 2011

SO ORDERED


HENRY PITMAN
United States Magistrate Judge

Copies mailed to:

Copies mailed to:

Mr. Americo Massa
Reg. No. 50396-054
FCI Talladega
Federal Correctional Institution
P.O. Box 1000
Talladega, Alabama 35160

William K. Hrones, Esq.
Assistant United States Attorney
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007